No. 93-646

In The
Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1993

SEABOURN S. LIVINGSTONE,
Petitioner/Cross-Respondent,

v.

PATRICIA A. DONAHEY,
Plaintiff/Respondent,

And

RICHARD M. DONAHEY
Plaintiff/Respondent/Cross-Petitioner

v.

HELEN L. BOGLE,
Third Party Plaintiff/Respondent/Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED

I. Does a businessman, unskilled in matters of law or environmental contamination, "exercise due care with respect to the hazardous substance concerned" within the meaning of § 107(b)(3) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9607(b)(3), by retaining skilled attorneys who in turn retain a skilled environmental consultant, and by following their directions and recommendations without alteration or modification?

II. Does a land contract vendor's specific performance remedy include the right to force title on an unwilling land contract vendee, where the vendor's contractual remedy in such circumstances is limited to the purchase price plus interest?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed, are those identified in the caption of the case, plus Defendant-Appellee St. Clair Rubber Company which, prior to 1983, was a Michigan corporation. The record of the case discloses no parent companies and no non-wholly owned subsidiaries of this Company, and Plaintiffs/Respondents know of none.

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CITATIONS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Opinion of the Court of Appeals is reported as *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993). A copy of that Opinion and of the Court of Appeals' Order Denying Petition For Rehearing With Suggestion For Rehearing *En Banc*, and the Judgment, is contained in the Appendix to Petitioner/Cross-Respondent Livingstone's Petition at pp. A-1–A-13. A copy of the Trial Court's Memorandum Opinion and Order dated October 1, 1991, is included beginning at p. A-14 of the same Appendix. A copy of the Trial Court's December 23, 1991 "Order Modifying October 1, 1991 Findings of Fact and Conclusions of Law," together with its Judgment of the same date, is included in the Appendix to Plaintiffs/Respondents Richard and Patricia Donahey's Brief In Opposition to Petitioner/Cross Respondent's Petition, beginning at p. APP-1 of that Brief.

JURISDICTION

Cross-Petitioner expressly relies upon Rule 12.3 to invoke the jurisdiction of this Court, as Petitioner's Petition was received September 14, 1993 and this Cross-Petition is being filed within thirty days of that date. The Court of Appeals denied a timely petition for rehearing with a suggestion for rehearing *en banc* on June 15, 1993, and Petitioner's Petition appears to have been filed within ninety days of that date. Petitioner's reliance upon 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651, to invoke the jurisdiction of this court, appears to have been well founded.

STATUTES INVOLVED

Pertinent sections of CERCLA involved in this Cross-Petition (in addition to those sections set out in Petitioner's petition) are CERCLA § 101(35)(A)(i) AND § 107(b), being 42 U.S. Code 9601(35)(A)(i) and 9607(b). The text of these sections is set forth verbatim in the appendix beginning at 1a.

CONCISE STATEMENT OF THE CASE

This Cross-Petition seeks review of a judgment of the Court of Appeals for the Sixth Circuit. In compliance with Rule 14.1(i), Cross-Petitioner advises the Court that the basis for federal jurisdiction in the trial court (the District Court for the Eastern District of Michigan) was CERCLA, 42 U.S.C. § 9601, *et seq.* Cross-Petitioner makes particular reference to CERCLA § 113(b), 42 U.S.C. § 9613(b), providing for "exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy," in the United States district courts.

I. DUE CARE

As for the question of whether Cross Petitioner met the "due care" and "precautions" requirements of CERCLA § 107(b)(3) once the "hazardous substances" contamination problem was discovered, the following facts are pertinent.

From 1962–1982, an industrial property in Marysville, Michigan, was owned by Cross-Respondent Bogle and leased to a manufacturer, Defendant-Appellee (in the Court of Appeals) St. Clair Rubber Company ("St. Clair"). In 1982, St. Clair vacated the property and Cross-Respondent Bogle sold it on land contract to Cross-Petitioner Donahey, Petition at A-16, A-20. In the winter of 1985–6, newspaper reports of St. Clair's careless waste handling practices on the property in the past prompted Cross Petitioner "through their attorneys [to] engage the services of an environmental consultant, Lawrence Halfen, Ph.D." P. 7, Brief of Cross-Respondent Bogle to the Court of Appeals for the Sixth Circuit, dated June 12, 1992.[1]

[1] The record is clear that, prior to August 1987, the site was examined by officials from Michigan's Department of Natural Resources ("MDNR")

(continued on next page)

In the spring of 1986, Dr. Halfen investigated the property and that summer accompanied a government-retained private contractor, Ecology & Environment, Inc., in its investigation and sampling of the site. No severe environmental contamination having been found (per Ecology & Environment, Inc.'s report, Trial Exhibit 21), Dr. Halfen in 1987 recommended to Cross-Petitioner's attorneys, Messrs. Pepper, Hamilton & Scheetz, that a surficial clean up of the site, to cost about $30,000, be carried out. The recommendation was presented to Cross-Petitioner, who gave his approval. The work was carried out in the last week of August 1987. On the third day of this clean-up, Dr. Halfen unexpectedly encountered several underground pits containing industrial wastes. Upon his recommendation to the attorneys, a recommendation in which Cross-Petitioner concurred, a nearby water-containing lagoon was drained and the contents of the pits were translocated to the lagoon. A-21–24. In October 1987, Dr. Halfen made a further proposal, with an estimated cost of $450,000, which the Donaheys did not approve; instead, in November 1987, the Donaheys promptly filed suit against Cross Respondents and St. Clair Rubber Company. Trial Court Opinion at A-25.

It was Dr. Halfen's actions in translocating the contents of the pits to the lagoon which caused the trial court to find, and the appellate court not to reject such finding, that Dr. Halfen's actions did not constitute "due care" as required by CERCLA. See Trial Court's Opinion at A-12–14; Appellate Court Opinion at A-7–9.

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and the United States Environmental Protection Agency ("U.S. EPA"), who retained a private contractor, Ecology & Environment, Inc., to investigate and sample the site and produce an elaborate report (Tr. Ex. 21). Before August 1987, however, neither Ecology & Environment, Inc., nor Dr. Halfen (who accompanied their representatives in their testing) nor MDNR, nor U.S. EPA, found any evidence of these underground pits. Cross Petitioner was aware, at the time of purchase of the property in 1982, that there was a "dump" on the property but had no awareness of the underground pits. See Court of Appeals' Opinion at pp. A-2–3 of Petitioner's Petition.

A. Trial Court Decision

The trial court's Memorandum Opinion And Order (found at p. A-14 of Petitioner's Petition in this cause) did not directly address or decide the "due care" question here presented. Rather, the trial court faulted Cross-Petitioner for the failings of the environmental consultant, Dr. Lawrence Halfen, in the consultant's having "disrupted the settled wastes by transferring them to the large lagoon" and the consultant's "failure to comply with the NCP [National Contingency Plan]." Trial Court Opinion at A-43. Although the trial court specifically "notes that the Donaheys [Cross-Petitioner and his wife, Plaintiff/Respondent Patricia A. Donahey] did not exacerbate the condition of the land by translocating the wastes from the pits to the large lagoon . . .," the trial court otherwise excoriated Cross-Petitioner for the actions of Dr. Halfen in failing to guard against "leaching and run-off" and "creating an attractive nuisance." Opinion at pp. A-37, 43–44.

Based on these factual findings, the trial court found that "the third party defense under § 9607 (b) (3) is not available to" Cross-Petitioner. At A-44.[2]

B. Appellate Court Decision

The appellate court's decision, found at Petitioner's Petition beginning at p. A-1, likewise did not directly address or

[2] The trial court also found that Cross-Petitioner "failed to take precautions against the consequences that could foreseeably result from the acts or omissions of the third party." At A-43. This was in apparent reference to § 107 (b)(3)(b)'s requirement that one seeking to establish this "third party defense" must also show that "he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." To the extent that this requirement is found to be different from the "due care" requirement discussed in the body of this Cross Petition, Cross-Petitioner seeks this Court's review of that matter as well. From its context, however, it would seem that the required "precautions" are "against *foreseeable* acts or omissions," such that where "such third party," as here, had committed its "acts or omissions" many years before Cross-Petitioner's attention was brought to the problem, the requirement would not appear to pose any hindrance to Cross-Petitioner's attempt to establish the defense since the requirement is inapplicable.

decide the question here presented. Like the trial court, the appellate court faulted Cross-Petitioner by name for the perceived failings of the consultant, Dr. Halfen. Pp. A-7–10. Thus, the appellate court seems to have assumed that the lack of care of the consultant *ipso facto* connoted lack of the requisite statutory "due care" by the Cross-Petitioner.

The question here presented to this Court is this: Given that the consultant had excellent credentials, and that he was hired not by the Donaheys but by their retained attorneys who, likewise, had excellent credentials, did the Cross-Petitioner exercise "due care" within the meaning of the statute notwithstanding the lack of such care ascribed to the consultant?

II. LAND CONTRACT VENDOR'S SPECIFIC PERFORMANCE REMEDY

As for the question of whether the land contract vendor (Cross-Respondent Bogle) should have a specific performance remedy of forcing title on an unwilling land contract vendee such as Cross-Petitioner, in addition to a specific performance remedy of receiving the purchase price, plus interest, the following facts are pertinent.

When Cross-Petitioner purchased the property on land contract in 1982, the 1982 printed form of land contract, augmented by other specific provisions, was admittedly selected and drafted by the vendor's (Respondent Bogle's) attorneys and real estate agent. Like any typical contract, it obliges the vendor "to execute and deliver . . . a good and sufficient warranty deed conveying title to said land . . . ." The vendee's obligations are also typical, "to purchase said land and pay the seller [vendor] the sum aforesaid,with the interest thereon as above provided." (Quotations are from Trial Exhibit 4, land contract dated January 6, 1982.)

The issue was extensively briefed by the affected parties (Cross-Petitioner, and Respondent Bogle) both at trial and

on appeal. The Trial Court, without further explanation, held only that Cross-Respondent "Helen Bogle is entitled to specific performance of the land contract and the Donaheys must accept a deed to the land." Petition at A-56. The Trial Court's Judgment, as thereafter entered on December 23, 1992 (copy attached to Plaintiffs/Respondents' Brief In Opposition, at APP-4), declared that "judgment for specific performance is granted in favor of Helen L. Bogle against Richard M. Donahey, by which Richard M. Donahey is ORDERED to accept title to the property, 2408 Wills, Marysville, St. Clair County, Michigan, as and when presented and, upon failure of Richard Donahey to accept title, Helen L. Bogle is granted the right to present this JUDGMENT as deed of ownership of Richard M. Donahey of the property . . . ." Opposition Brief at APP-5. The Court of Appeals, without elaboration, made note of the fact that the Trial Court had "made additional findings and conclusions, including" the following:

> 1. Richard Donahey was required to accept title to the property and if he failed to do so, Mrs. Bogle was entitled to present the judgment as deed of ownership to Richard Donahey. (Petition at A-5.)

The Appellate Court appeared to affirm this "finding and conclusion" by affirming the Trial Court "as to all aspects of the case" except for specified matters not relevant to this issue. Petition at A-11.

ARGUMENT

I. DUE CARE

The first question presented in this Cross-Petition involves an important question of federal law which has not been settled by this Court. It is an issue which faces any current owner of real property who, like Cross-Petitioner in this case, comes upon a problem of environmental contamination of the property which is not at all of his making. This, because CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), broadly

imposes liability upon "the owner and operator of a facility" whether or not such owner had anything to do with causing the environmental problem in the first place. Many thousands of persons find themselves in such circumstances every year, even judging the matter only from reported cases from courts of record around the nation.

The CERCLA § 107(b)(3) defense (Appendix at p. a1) requires in its plain wording three elements to establish the defense:

1. No contractual relationship with a third party in connection with which that third party polluted;

2. Due care; and

3. Precautions taken against foreseeable acts of that particular third party and consequences which could follow from such acts.

These requirements are statutory and inclusive. They significantly do *not* include any requirement that (1) the person seeking to establish the defense be a so-called "innocent purchaser" as referenced in the definition of the term "contractual relationship" at CERCLA § 101(35)(A)(i), 42 U.S.C. §9601(35)(A)(i) (App at p. 1a) or that (2) the person asserting the defense comply with "the national contingency plan" ("NCP"), as referenced in CERCLA § 107(a)(4)(B), found in Petitioner's Petition at p. A-61. Thus, even though Cross-Petitioner admittedly knew that there was a "dump" on the property at the time he purchased it in 1982, that knowledge does not disqualify him from establishing the "due care" defense under CERCLA § 107(b). *See, Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp.*, 737 F. Supp. 1272 (W.D.N.Y. 1990), 767 F. Supp. 456, 460 (W.D.N.Y. 1991), *affd* 964 F.2d 85 (2d Cir. 1992). Similarly, while being "consistent with the national contingency plan" is prerequisite to recovery of "any other necessary costs of response" under CERCLA § 107(a)(4)(B), it is explicitly *not* a prerequisite for establishing the CERCLA § 107(b) defense.

With respect to the requirement that no "contractual relationship" within the meaning of the statute exist, it is plain that Cross-Petitioner was not party to any contract with any third party whose acts or omissions (of pollution) occurred in connection with any contractual relationship with Cross-Petitioner. *Shapiro v. Alexanderson*, 743 F. Supp. 268, 271 (S.D.N.Y. 1990); *Westwood Pharmaceuticals v. National Fuel*, 737 F. Supp. 1272, 1285–6 (W.D.N.Y. 1990), *affirmed* 964 F2d 85 (2d Cir 1992). Neither Cross-Respondent Bogle nor Petitioner Livingstone has made any claim below that any statutorily-prohibited "contractual relationship" existed, and the Trial Court specifically concluded that neither Cross-Respondent Bogle nor St. Clair had "any relevant contractual relationship to Donahey." Petition at p. A-42. (Cross-Petitioner never had any contractual relationship of any kind with Petitioner)

With respect to the third requirement listed above, the "precautions" requirement, it is apparent from the statute that this aspect of the defense applies only to "such acts" of "such" particular "third party;" here, St. Clair. Because St. Clair left the property before Cross-Petitioner bought it, the "precautions" defense would appear to be inapplicable. See also this Cross-Petition, at footnote 2.

The core issue, and the question certainly presented in this case is the second requirement, "due care." CERCLA nowhere defines "due care" and the only substantial authority on the subject — CERCLA's legislative history — supports Cross-Petitioner's claim that the "due care" requirement is met when one makes proper "selection and instruction of a responsible contractor or other independent party" to address the problem. 5 U.S. Code, *Cong. & Admin. News*, at 6137 (1980). The passages of this legislative history relating to defenses to liability are reproduced in the Appendix, beginning at p. 3a.

It is altogether fitting and proper that the current owner of a piece of real property (sullied many years earlier, and before the owner purchased the property, by a "third party"

as defined in CERCLA § 107(b)(3), App p. 2a), be exonerated if he hires experts and follows their instructions. Perhaps a higher standard of care, or a non-delegable duty of care, should be imposed on one who caused the problem, or could have prevented it from occurring. But where, as here, Cross-Petitioner as "owner" had nothing to do with the problem except for mistakenly buying into it, the "due care" requirement should be met by hiring "a responsible contractor or other independent party."

It is not just the legislative history of this phrase which supports Cross-Petitioner's position. Rather, and in addition, the record is clear that Cross-Petitioner (alone among the parties) promptly hired expert assistance and did what the experts told him to do until, facing a proposal that he spend another $450,000 — fifteen times what he had already spent — he as promptly brought suit against the Defendants as the parties ultimately responsible for this environmental catastrophe. It may also be pertinent to point out that "due care" is universally regarded as "reasonable and prudent" action; it is variously defined as the equivalent of ordinary or reasonable care. See numerous cases cited at 65 C.J.S., *Negligence*, § 11, and 57A AmJur 2d *Negligence*, § 144. "An act or omission is generally not negligent which can only be done or prevented by the exercise of extraordinary exertion or care or the expenditure of *extraordinary sums of money* . . ." *Id.*, § 144 at p. 206, emphasis supplied.

Should the Court accept this Cross-Petition on this point? Cross-Petitioner respectfully suggests that it should, if it decides to accept either issue raised by the original Petition. Petitioner argues with respect to *his* issues their "paramount importance because of the vast number of CERCLA actions in which these questions arise, the huge financial liability associated with them, and the need for a uniform national treatment of potentially responsible parties under the statute." Petitioner's Brief at p. 9. Yet the issues Petitioner raises — private party attorney fees, and individual liability of a 100% corporate shareholder — can only arise in the few cases

where matters are tried to completion and judgment, or a 100% shareholder is involved.

By contrast, the situation presented by this Cross Petition is universal. It involves every owner of contaminated property where those actively responsible for the contamination refuse (as in this case) to join in working with the current owner in any way. What must such an owner do, to exercise "due care"? Surely it is enough to hire the very best experts he can find and do what they tell him to do. Just as surely he or she should not be required to expend truly "extraordinary sums of money" in order to meet the "due care" standard.

II. VENDOR'S SPECIFIC PERFORMANCE REMEDY

The second question in this Cross Petition broadly raises "special and important reasons" (Rule 10) for granting this Cross Petition. Simply stated, in the last 90 years there is no reported U.S. court decision that has ever compelled an unwilling land contract vendee to accept title to the real property — except for the case at bar. In situations where (as here) the land contract vendee has breached the contract, all courts granting "specific performance" to the land contract vendor have confined that remedy to "the recovery of money, the purchase price." *Pearson v. Gardner*, 202 Mich. 360, 362, 168 N.W. 485 (1918), as also quoted in *Lutz v. Dutmer*, 286 Mich. 467, 482, 282 N.W. 431 (1938).

The parties' research disclosed a single Maryland appellate decision, *Maryland Clay v. Simpers*, 53 A. 424 (Md. App. 1902), as favorably quoted (but, Cross Petitioner contends, on distinguishable facts) in 1977 (*Archway Motors v. Herman*, 37 Md. App. 674, 682–683, 378 A.2d 720 (1977)) which arguably held that an unwilling vendee could be forced to take a deed. In contrast stand all of the nation's other reported decisions, exemplified by decisions of the Michigan

Supreme Court,[3] that the vendor's specific performance remedy is limited to "the recovery of money, the purchase price;" that in order for title to pass a deed must be delivered and must be accepted by the grantee; and that "the law is clear that a grantee must assent to accept a deed for a delivery to be proper." *Gibson v. Diamond*, 281 Mich. 137, 274 N.W. 739 (1937).

Although disagreeing with the decision, Cross Petitioner must accept the finding of breach with the result that he must pay whatever is due under the land contract, plus interest. No case supports the proposition, however, that the vendor's remedy also includes the right to force title on an unwilling vendee, either under contract or, under the decided cases, as some equitable furtherance of specific performance doctrines. In another time and context, Daniel Webster argued that "it is not law, but violence, to rescind this contract and seize on the property."[4] So here "it is not law but violence" to rewrite this contract and forcibly transfer title to the property to Mr. Donahey.

Cross Petitioner respectfully suggests that the Court of Appeals for the Sixth Circuit "has so far departed from the accepted and usual course of judicial proceedings" in allowing this extraordinary and violent remedy to stand, that this Court should accept this Cross Petition for Writ of Certiorari on such an issue. Rule 10.1 (a), Rules of the Supreme Court.

[3] *Resh v. Fox*, 365 Mich. 288, 112 N.W.2d 486 (1961); *Gruskin v. Fisher*, 405 Mich. 51, 213 N.W.2d 893 (1979); *Watson v. Hillman*, 57 Mich. 607, 608, 24 N.W. 663 (1885)

[4] "The Great Speeches And Orations of Daniel Webster," *The Legal Classics Library Edition* 1, 12 (1894 and 1989) (Mr. Webster's argument before the Supreme Court of the United States, at Washington, on the 10th of March, 1818, in the *Dartmouth College* case).

CONCLUSION

The within Cross Petition for Certiorari should not be granted unless Petitioner's Petition is granted, pursuant to Rule 13.5. If the original Petition is granted, this Court is asked to grant Cross-Petitioner's request for writ of certiorari for the reasons stated above.

Respectfully submitted,

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Dated: October 12, 1993

APPENDIX TO CROSS-PETITION FOR CERTIORARI

RELEVANT STATUTORY PROVISIONS
42 U.S. Code § 9601 et. seq.

SUBCHAPTER I — HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

° ° ° ° °

§ 9601. Definitions. For purposes of this subchapter:

(35)(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

§ 9607. Liability

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

5 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 96th CONGRESS, SECOND SESSION (1980)

(at pages 6119, 6136 and 6137)

ENVIRONMENTAL RESPONSES ACT
P.L. 96-510

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980
P.L. 96-510, see page 94 Stat. 2767

° ° ° ° °

DATES OF CONSIDERATION AND PASSAGE

House September 23, December 3, 1980

Senate November 24, 1980

The House bill was passed in lieu of the Senate bill. The House Report (Part I, this page; Part II, page 6151) and a Related Report (page 6160) are set out.

HOUSE REPORT NO. 96-1016, PART I

° ° ° ° °

LEGISLATIVE HISTORY
P.L. 96-510
[page 33]

Subpart F—Liability for Hazardous Waste Releases

Liability for Releases

° ° ° ° °

Paragraph (1) of subsection (a) Section 3071 would establish certain defenses to liability. Specifically, if a defendant establishes that a release or threatened release of hazardous waste was caused solely by an act of God or an act of war,

negligence on the part of the United States, an act or omission of a third party or any combination of the foregoing, he shall not be held liable under this section. The act of God defense is intended to mean those natural disasters or natural phenonemon of an exceptional or unanticipated character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. In order to successfully interpose a listed defense, the defendant must demonstrate causation in accordance with the principles described above.

With respect to the third party defense, a defendant is also required to establish that he exercise due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such waste. The defendant must show that he exercised due care with respect to all reasonably foreseeable acts or omissions of a third party. For instance, in the case of a defendant generator, shipper, transporter, or disposer, the defendant must demonstrate that he exercised due care in the selection and instruction of a responsible contractor or other independent party engaged by such defendant or [sic] the transportation, storage, treatment, or disposal of the waste, provided adequate information as to the identity, quantity, composition, condition and characteristics of the waste to such person, and took reasonable measures to assure or verify that such person properly carried out the activities for which he was engaged. Such defendant must also demonstrate that he properly labeled, loaded, and packaged the waste and properly equipped and maintained the container or facility used for the transportation, storage, treatment, or disposal of the waste. In general, the Committee intends that for a defendant to establish that he exercised due care, the defendant must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.

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PATRICIA A. DONAHEY,
Plaintiff/Respondent,
and
RICHARD M. DONAHEY,
Plaintiff/Respondent/Cross-Petitioner,
and
HELEN L. BOGLE,
Third Party Plaintiff/Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

PETITIONER/CROSS-RESPONDENT SEABOURN S. LIVINGSTONE'S

BRIEF IN OPPOSITION

TO CROSS-PETITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHERE A LAND OWNER KNOWS THAT THE PROPERTY HE IS PURCHASING CONTAINS AN INDUSTRIAL DUMP AT WHICH LIQUID AND SOLID WASTES HAVE BEEN DISPOSED, BUT FAILS TO INVESTIGATE TO DETERMINE IF THE PROPERTY HAS BEEN CONTAMINATED WITH HAZARDOUS SUBSTANCES, DOES HIS HIRING OF AN "ENVIRONMENTAL EXPERT" FOUR YEARS LATER AND FAILING TO COMPLY WITH THE EXPERT'S RECOMMENDATIONS CONSTITUTE "DUE CARE" FOR PURPOSES OF 42 U.S.C. 9607(B)(3)?

II.

DOES A LAND CONTRACT VENDOR'S SPECIFIC REMEDY INCLUDE THE RIGHT TO FORCE TITLE ON AN UNWILLING LAND CONTRACT VENDEE?

LIST OF PARTIES

The parties to the proceeding are as stated in the Petition and Cross-Petition to this Court.

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No. 93-646

In The

Supreme Court of the United States

October Term, 1993

SEABOURN S. LIVINGSTONE,
Petitioner/Cross-Respondent,
v.
PATRICIA A. DONAHEY,
Plaintiff/Respondent,
and
RICHARD M. DONAHEY,
Plaintiff/Respondent/Cross-Petitioner,
and
HELEN L. BOGLE,
Third Party Plaintiff/Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

PETITIONER/CROSS-RESPONDENT SEABOURN S. LIVINGSTONE'S

BRIEF IN OPPOSITION

TO CROSS-PETITION

JURISDICTION

Petitioner/Cross-Respondent agrees that the jurisdiction of this Court has been properly invoked pursuant to Rule 12.3 of the Supreme Court Rules, 28 U.S.C. 1254(1) and 28 U.S.C. 1651.

STATUTES INVOLVED

Petitioner/Cross-Respondent agrees with Cross-Petitioners' citations to the statute involved in connection with Cross-Petitioners' Cross-Petition.

CONCISE STATEMENT OF THE CASE

Livingstone opposes the Cross-Petition with respect to the issue whether Richard Donahey may avail himself

of CERCLA's "third party" defense as provided in 42 U.S.C. 9607(b)(3). Donahey's Cross-Petition is premised upon a gross distortion of the facts as found by lower court rather than upon the record as a whole. The facts below, which were omitted from the Cross-Petition, are pertinent to whether review should be granted as to the latter issue.

Cross-Respondent Livingstone does not contest the statement of the case presented by Cross-Petitioners with respect to Issue II of the Cross-Petition, the Land Contract Vendor's Specific Performance Remedy, at page 7 of the Cross-Petition. Livingstone has no interest in the Cross-petition with respect to the land contract issue, as the resolution of that question does not affect his liability or the issues for which he seeks review by this Court.

Facts

In the fall of 1981, Richard Donahey expressed interest in purchasing the property at issue in this case. He inspected the property and charted an area on it which had been used as a dump. He was at that time "familiar with the risk of environmental liability posed by the maintenance and use of industrial realty," because of his liability for some PCB contamination of land owned by his closely held corporation. Trial Court Memorandum Opinion and Order, Petition, at A18-A19. Donahey's attorney sent a letter to Bogle, the owner of the property, expressing concern over the presence of a dump.

On January 1, 1982, Donahey entered into an "Agreement to Clean Up Dump" with St. Clair Rubber Company, the former tenant of the property. Donahey acknowledged in the agreement that the property had been used by St. Clair as a dumping site for both liquid and solid, possibly toxic, waste materials. *Id.*, at A19;

Trial Exhibit 6. Despite his awareness that the property had been used as an industrial dump, that it might be environmentally defective, that it might result in litigation and that its condition might be in violation of state and federal laws, Donahey signed the land contract on the same day he signed the Agreement — January 1, 1982. Trial Court Memorandum, Petition, at A19.

The Agreement to Clean Up Dump required St. Clair to complete its clean up of the property by June 30, 1982. Although St. Clair never performed this clean up, the Donaheys did nothing to enforce the Agreement. Donahey, R. 208 at 171. St. Clair ceased operations some time in 1982. Trial Court Memorandum, Petition, at A20.

In late 1985, a local newspaper reported that there had been some dumping of hazardous waste on the property. *Id.*, at A20. The Donaheys did not hire an environmental consultant until after April 1986, when the Michigan Department of Natural Resources (MDNR) sent the Donaheys, among others, letters informing them that the property was listed as a site of environmental contamination due to alleged solvent and adhesive dumping in the lagoons on site. The letters also designated them potentially responsible parties and requested the performance of a hydrogeological investigation. *Id.*, at A20; Donahey, R. 207 at 8-11; Trial Exhibit 18. The Donaheys did not comply with these requests. Donahey, R. 208 at 22-23.

Only in the spring of 1986, fully four years after they purchased the property, did the Donaheys hire their environmental expert, Lawrence Halfen, "to supply technical assistance in determining their course of action." Trial Court Memorandum, Petition, at A20-A21. They did not supply him, however, with the letters they had received from the MDNR. Halfen, R.209 at 86. Halfen inspected the property in June, 1986 and again in August, 1986, Trial Court Memorandum, Petition, at A21. Halfen later (in August, 1986) accompanied employees

of an environmental consulting firm, Environmental Engineering (E&E), which was directed by the Environmental Protection Agency to assess the site for potential inclusion on the Superfund list. After E&E issued its report, which identified several hazardous materials in samples taken from the property, Halfen submitted a clean-up proposal with a cost estimate of $30,000-$35,000. *Id.*, at A22.

Halfen's attempt to clean up the property in late August 1987 proved beyond any doubt that the environmental contamination consisted of more than the rubbish heaps, rubber deposits and rusted out 55 gallon drums visible to the eye on the surface of the property, as detailed in the trial court's Memorandum, Petition, at A23-A24. The trial court found, and the Sixth Circuit affirmed the finding, that Halfen's efforts exacerbated rather than remediated the environmental problems on the property. *Id.*, at A43-A44; *Donahey* v. *Bogle*, 987 F.2d 1250 (6th Cir. 1993), Petition, at A9 and A11. Halfen informed the MDNR of his discovery and the actions he took after completing his activities on the property. He subsequently proposed further clean up measures at an estimated cost of over $440,000, which the Donaheys did not do. *Id.*, at A4; Trial Court Memorandum, Petition, at A25.

The Donaheys abandoned the property in 1990 after their unsuccessful attempt to quitclaim it to Bogle. *Id.*, at A26. No cleanup plan has ever been submitted to the MDNR, and the site has never been remediated. Donahey, R. 207 at 28.

Based on "all relevant facts and circumstances," the trial court held that because Richard Donahey failed to use due care and failed to guard against foreseeable consequences, the third party defense under 42 U.S.C. 9607(b)(3) was not available to him. Trial Court Memorandum, Petition, at A44. The Sixth Circuit affirmed. Petition, at A8-A9, A11.

REASONS FOR DENYING THE WRIT

I.

DUE CARE ISSUE

The Cross-Petition seeking review of the Sixth Circuit's holding that Donahey did not exercise "due care" (as required to qualify for CERCLA's third-party defense, 42 U.S.C. 9607(b)(3)) should be denied. Donahey argues that reasonable reliance on the advice of an expert constitutes "due care". However appealing that issue sounds on a theoretical basis, it is not present under the facts of this case, and therefore would not properly be before this Court if certiorari were granted. Supreme Court Rule 15.1. Furthermore, the issue is not an important question of federal law which should be settled by this Court, nor is the Sixth Circuit's decision on the issue one which conflicts with any decision of this Court or another appellate court. Supreme Court Rule 10.

A. Whether Reliance Upon The Advice Of An Expert Constitutes "Due Care" As Required By 42 U.S.C. 9607(B)(3) Is Not Presented By The Facts Of This Case.

Donahey argues that this Court should determine that landowner's reasonable reliance on expert advice constitutes "due care" for purposes of CERCLA's third party defense. This argument, however, is premised on a mischaracterization of the facts and of the basis for the decisions of the courts below on this issue. Donahey's third party defense was unsuccessful not because Halfen's "remediation" was inadequate but because Donahey had become liable under CERCLA years before he first contacted Halfen.

42 U.S.C. 9607(b)(3) provides a defense against liability for (1) landowners who acquire property without

knowing of any contamination at the site and without reason to know of any contamination; and (2) owners of property ("clean" at time of purchase) which later is contaminated by the acts of third persons. The critical determination for finding the defense available to a land owner is that the land owner, whenever he or she learns of the release, must act with reasonable care. H.R.Conf.Rep. No. 962, 99th Congress, 2d Sess. 186-87, *reprinted in* 1986 U.S. Code Cong. & Admin.News 2835, 3279-80. In the case of a person claiming to be an innocent purchaser of contaminated land, the duty to inquire is to be judged as of the time of acquisition, and the provisions of 42 U.S.C. 9601(35)(B) as to "reason to know" govern the purchaser's responsibility with regard to acts of third parties prior to purchase. *Id.*

Richard Donahey clearly does not qualify as an innocent land purchaser. He purchased the property knowing of the existence of the dump; he knew that industrial wastes, both liquid and solid, had been disposed of there; and he knew that there was a risk of liability, litigation and the existence of federal and state law violations. He chose not to investigate the risk or the extent of the environmental hazard on the property, and, despite his awareness of the problems, purchased the property. Under these circumstances, for Donahey to claim (as he does at pages 4-5, footnote 1 of the Cross-Petition) that he had no idea that there might be contaminants *under* the dump is ludicrous at best and frivolous at worst.

Donahey states in his Cross-Petition that the trial and appellate courts "did not directly address or decide the 'due care' question here presented." Cross-Petition, at 6. The courts below did not address Donahey's argument that his hiring of an environmental expert insulated him from liability because the question does not even arise

under the facts in this case: Donahey acted with total disregard and in defiance of the environmental risks presented by the property long before Dr. Halfen appeared upon the scene.

Moreover, even if Donahey had purchased the land without knowing and without reason to know of the contamination, his actions subsequent to purchase by no stretch of the imagination constitute the "due care" required by 42 U.S.C. 9607(b)(3). Although notified by the MDNR that the site was listed as a contaminated site requiring investigation and remedial action, under CERCLA and under Michigan's Environmental Response Act (the state law equivalent of CERCLA), Donahey failed to comply with MDNR requests to investigate the property. He failed to inform his own environmental expert — hired over four years after Donahey learned of the dump and the potential contamination by hazardous materials — of the MDNR's letters, and never performed the final clean up of the property as recommended by that expert.[1]

This is not a case where a prospective purchaser relied, prior to purchase, on an expert's erroneous opinion that the property was not contaminated. Nor is it a case where a land owner discovered that land was contaminated after the purchase and then acted pursuant to an expert's advice as to how to remedy the release. Perhaps these cases will arise in the future and

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[1] **Donahey cites H.R. 96-1016, 96th Cong. 2d Sess., reprinted in 5 U.S. Code Cong. & Admin. News at 6119, 6136 and 6137, as support for his position that he exercised due care by hiring Dr. Halfen. *See*, Cross-Petition at 10-11, 3a-4a. In fact, that portion of the legislative history requires a person to exercise due care in the instruction of the contractor, to provide the contractor with adequate information and to take all precautions with respect to the particular waste that a reasonable person would take — all of which Donahey failed to do.**

the issue whether reliance upon expert advice constitutes due care should and will be addressed by this Court. What is certain, however, is that that question is not presented here. This Court, therefore, should deny certiorari on Issue I of the Cross-Petition.

B. The Issue Whether Reasonable Reliance Upon The Advice Of An Expert Constitutes Due Care Is Not Important And Review By This Court Of The Issue Is Not Necessary.

Donahey claims that the due care issue in this case is important because the situation presented by the Cross-Petition is "universal" and involves every owner of contaminated property. The issue presented (even as stated by Donahey) is not, however, what constitutes due care generally, but whether a landowner's reliance upon an expert hired by his attorneys constitutes "due care" for the purposes of the third party defense under 42 U.S.C. 9607(b)(3). This is, as the absence of case law involving the issue demonstrates, a much more unusual situation than that which faces "every owner" of contaminated property.

Donahey's assertion of the importance of the due care issue, therefore, is unsupported. Donahey cites no cases in which the issue has indeed arisen, and points to no conflict among the Federal Courts of Appeals or even among the Federal District Courts. This absence of case law indicates that the issue is neither important nor universal, as it appears not to have been pursued at all until this case.

II.

LAND CONTRACT ISSUE

Cross-Respondent Livingstone, as stated above, takes no position on whether this Court should grant certiorari on the land contract issue described at pages 7-8 and 12-13 of the Cross-Petition.

CONCLUSION

Whether or not certiorari is granted on the Petition in this case, Livingstone respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari as to Issue I.

Respectfully submitted,

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